

IN THE CIRCUIT COURT OF THE STATE OF OREGON  
FOR THE COUNTY OF MULTNOMAH

**21+ TOBACCO AND VAPOR RETAIL  
ASSOCIATION OF OREGON**, a domestic  
non-profit corporation; **NO MOKE  
DADDY, LLC**, a domestic limited liability  
company, doing business as **DIVISION  
VAPOR**; and **PAUL BATES**, an Individual

Plaintiffs,

v.

**MULTNOMAH COUNTY**; a political  
subdivision of the State of Oregon

Defendant.

Case No.

**COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF**

Claims not subject to mandatory arbitration

Filing Fee: \$281.00  
(ORS 21.135(1), (2)(f))

Plaintiffs 21+ Tobacco and Vapor Retail Association of Oregon (the “Association”), No  
Moke Daddy, LLC, dba Division Vapor (“Division Vapor”), and Paul Bates (“Bates”)  
(collectively, “Plaintiffs”) allege as follows for their Complaint against Multnomah County  
(“Defendant”).

1.

Plaintiffs seek injunctive and declaratory relief pursuant to ORS 28.020 against Multnomah  
County’s Ordinance No. 1311 entitled: “Ordinance Amending Multnomah County Code Sections  
21.513 to 21.515, 21.550, 21.560, and Section 21.563.” (hereinafter the “Ordinance” or “MCO  
1311”).

///

2.

Plaintiffs also seek injunctive and declaratory relief pursuant to ORS 28.020 against Multnomah County's Code of Ordinances ("MCC") §§ 21.561, 21.564, 21.566, 21.567, 21.568, and any other section of the Multnomah County Code that requires, enforces, or are otherwise part of the local tobacco retail licensure scheme ("Multnomah County Tobacco Retail License Program").

### JURISDICTION AND VENUE

3.

Plaintiff 21+ Tobacco and Vapor Retail Association of Oregon (the "Association") is a domestic non-profit and non-stock corporation, with its principal place of business in Tigard, Oregon organized and operated as a mutual benefit non-profit that is exempt from federal income taxes under section 501(c)(6) of the United States Internal Revenue Code. The Association is supported by individuals and businesses licensed to sell tobacco across the State, including individuals and businesses licensed to sell tobacco in Multnomah County. The Association is also supported by manufacturers and distributors of products banned under MCO 1311, as well as individual consumers.

4.

The Association brings this action in a representational capacity on behalf of, and asserting the interests of, their members and supporters in Multnomah County. Each of these members would have standing to challenge MCO 1311 in their own right. Protection of these members' and supporters' rights and interests is germane to the Association's mission to promote and protect the legal and responsible sale of tobacco products in Oregon. Litigation of the challenges raised in this case does not require the participation of each of the Association's members and supporters, and

1 the Association is capable of fully and faithfully representing the interests of their members and  
2 supporters without participation by each individual or business.

3 5.

4 All Plaintiffs bring this action to confer a substantial benefit on the hundreds of similarly  
5 situated businesses and business owners who, like Plaintiff Division Vapor and many of the  
6 members and supporters of Plaintiff Association, will be put out of business due to MCO 1311.

7 6.

8 All Plaintiffs also bring this action to confer a substantial benefit on the hundreds of  
9 similarly situated businesses and business owners who, like Plaintiff Division Vapor and many of  
10 the members and supporters of Plaintiff Association in Multnomah County, who continue to be  
11 negatively impacted by the unlawful continuation of The Multnomah County Tobacco Retail  
12 License Program, including MCC §§ 21.561, 21.564, 21.566, 21.567, 21.568, and any other  
13 section of the Multnomah County Code that requires, enforces, or are otherwise part of the local  
14 tobacco retail licensure scheme.

15 7.

16 Plaintiff Bates owns Division Vapor which has two locations in Multnomah County,  
17 Oregon. Plaintiff Bates is a member and board member of the Association. Plaintiffs Bates and  
18 Division Vapor are licensed by Multnomah County as tobacco retailers.

19 8.

20 Defendant Multnomah County is a political subdivision of the State of Oregon.

21 9.

22 This Court has jurisdiction pursuant to ORCP 4(A)(4) because all Defendants are engaged  
23 in substantial and not isolated activities within the State of Oregon.

10.

This is the proper venue pursuant to ORS 14.050(2).

### GENERAL ALLEGATIONS

11.

On or about December 15, 2022, the Multnomah County Board of Commissioners (the “Board”) adopted MCO 1311, which amends MCO Sections 21.513 to 21.515, 21.550, 21.560, and 21.563.

12.

At Section 5, MCO 1311 amends MCC § 21.560 to define a “Flavored Tobacco Product” as follows:

***Flavored Tobacco Product.*** Tobacco product with a distinguishable or distinctive natural or artificial taste, flavor, smell or aroma, other than tobacco, that emanates from or is imparted by a tobacco product, a component of a tobacco product, or a tobacco product’s smoke or vapor at any time prior to or during consumption. Flavored tobacco products include (but are not limited to) those tobacco products with a mint, menthol, wintergreen, fruit, candy, honey, cocoa, chocolate, herb, spice, vanilla, liquor, and any and all other distinguishable or distinctive natural or artificial tastes, flavors, smells, or aromas, other than tobacco.

See MCO, 1311 (Exhibit 1, 3).

13.

At Section 6, MCO 1311 amends MCC § 21.563 to define “Tobacco Products” as follows:

(A) Any substance containing, made, or derived from tobacco or nicotine, natural or synthetic, that is intended for human consumption by any means including but not limited to cigarettes, cigars, little cigars, pipe tobacco, shisha, hookah tobacco, snuff, chewing tobacco, dipping tobacco, bidis, or any other preparation of tobacco or nicotine.

See MCO, 1311 (Exhibit 1, 3).

///

14.

The term “tobacco” flavor is a misnomer; there is no tobacco in many of the products banned by MCO 1311. The products are artificially flavored. Requiring that a product be “tobacco” flavored according to the perception of an unknown, and presumably ordinary, person makes little sense. For instance, many tobacco users who smoke pipes may sense notes of vanilla, honey, or spice. This is comparable to wine, which is derived from grapes. Sommeliers may get notes of plum, black cherry, blackberry, blueberry, warm spice, vanilla, black pepper, tobacco and sometimes leather aromas from a standard bottle of cabernet sauvignon. However, the same sommelier may get notes of apples, apricots, peaches and pears from a bottle of Riesling. Notwithstanding the differentiation of subjective flavors, wine comes from grapes. To limit a retailer to stating only that a product is “tobacco” flavored would be equivalent to limiting the sommelier to saying that wine is “wine” flavored.

15.

Plaintiff Division Vapor requires that anyone entering its store be at least 21 years old and has signs posted at the entrance stating this requirement. Plaintiff Division Vapor vigorously enforces its restrictions prohibiting entry of underaged individuals.

16.

Vaping Liquids are consumable liquids which consist of vegetable glycerin, propylene glycol, water, commercial food flavoring, and nicotine, if desired and at varying concentrations (“Vaping Liquids”). Vaping Liquids are typically sold in small glass or plastic bottles.

17.

Vaping Liquids are consumed by atomizing the Vaping Liquid using a heated coil inside an E-Cigarette, producing a vapor the user inhales. Vaping Liquids come in thousands of flavors.

18.

Plaintiff Division Vapor sells Vaping Liquids containing varying concentrations of nicotine, or no nicotine. Many of Plaintiff Association's members and supporters, including those members and supporters in Multnomah County, also offer Vaping Liquids containing varying concentrations of nicotine, or no nicotine.

19.

Plaintiff Division Vapor does not offer for sale any product that contains tobacco, the common name for the plant *Nicotiana Tabacum* (the "Tobacco Plant").

20.

Many of Plaintiff Association's members and supporters, including those members and supporters in Multnomah County, offer for sale products that contain the Tobacco Plant.

21.

None of Plaintiff Division Vapor products contain the Tobacco Plant or taste like the Tobacco Plant without the addition of flavoring. None of Plaintiff Division Vapor's products meant to imitate the taste of the Tobacco Plant actually contain the Tobacco Plant or are derived from the Tobacco Plant. Very few manufacturers use naturally extracted tobacco flavorings because they are only available at much higher expenses. Usually, manufacturers use other artificial flavor combinations to fool the user's taste buds. While the flavor combinations used by individual manufacturers are generally proprietary, Plaintiff Bates has seen flavors like black currant, blueberry, blackberry, rums, and bourbons used to make certain tobacco flavorings.

22.

Vaping Liquids that are not artificially flavored to imitate the taste of the Tobacco Plant have a distinguishable or distinctive natural taste, flavor, smell, and aroma from their ingredients

1 that does not taste or smell like the Tobacco Plant. They taste, rather, like the vegetable glycerin,  
2 propylene glycol, or other oil bases they contain.

3 23.

4 Plaintiff Division Vapor offers for sale Vaping Liquids intended by the manufacturer to  
5 imitate the taste of the Tobacco Plant. Many of Plaintiff Association's members and supporters,  
6 including those members and supporters in Multnomah County, also offer for sale Vaping Liquids  
7 intended by the manufacturer to imitate the taste of the Tobacco Plant. Those products are  
8 unpopular. The products are also generally considered by users of the Tobacco Plant (*i.e.*, those  
9 who smoke cigarettes or chew chewing tobacco) to be a poor imitation of the flavor.

10 24.

11 Vaping has "the potential to benefit adults who smoke and who are not pregnant if used as  
12 a complete substitute for regular cigarettes and other smoked tobacco products," as recognized by  
13 the Centers for Disease Control and Prevention.<sup>1</sup>

14 25.

15 Vaping is safer than smoking the Tobacco Plant because vaping does "not burn tobacco  
16 and do[es] not produce tar or carbon monoxide, two of the most damaging elements in tobacco  
17 smoke."<sup>2</sup> In fact, "tobacco smoke contains more than 7,000 chemicals, more than 70 of which are  
18 known carcinogens. Smoking will kill half of all long-term users. E-cigarettes do not contain tar  
19 or carbon monoxide – 2 of the most harmful elements in tobacco smoke. They may contain some  
20

---

21 <sup>1</sup> Centers for Disease Control and Prevention, *About Electronic Cigarettes (E-Cigarettes)*, CDC  
22 [https://www.cdc.gov/tobacco/basic\\_information/e-cigarettes/about-e-cigarettes.html](https://www.cdc.gov/tobacco/basic_information/e-cigarettes/about-e-cigarettes.html) (accessed  
January 23, 2023).

23 <sup>2</sup> National Health Service (UK), *Using e-cigarettes to stop smoking*, NHS  
<https://www.nhs.uk/live-well/quit-smoking/using-e-cigarettes-to-stop-smoking/> (accessed  
January 23, 2023).

chemicals also found in tobacco smoke, but at much lower levels.”<sup>3</sup>

26.

Vaping has helped many smokers quit smoking.<sup>4</sup>

27.

Plaintiff Division Vapor customers are often former smokers who prefer vaping. Many of Plaintiff Association’s members and supporters, including those members and supporters in Multnomah County, are also former smokers who prefer vaping. Many former smokers prefer vaping for its lower health risks and the fact that the vapor is less offensive than the smell of cigarette smoke because it dissipates quickly and has a more pleasant smell due to the flavoring.

28.

Plaintiff Paul Bates has invested substantial time and resources into growing his businesses. Many of Plaintiff Association’s members and supporters, including those members and supporters in Multnomah County, have also invested substantial time and resources into growing their respective businesses.

29.

The sale of Flavored Tobacco Products, including e-cigarettes, Vaping Liquids, Inhalant Devices, etc. are not prohibited by the State of Oregon, subject to regulations and taxes.

30.

ORS 431A.190(5) provides that “inhalant delivery system” has the meaning given in ORS 431A.175, which in turn defines “inhalant delivery system” as follows:

(A) “Inhalant delivery system” means:

---

<sup>3</sup> National Health Service (UK), *10 myths about stop smoking treatments*, NHS <https://www.nhs.uk/live-well/quit-smoking/10-myths-about-stop-smoking-treatments/> (accessed January 23, 2023).

<sup>4</sup> *Ibid.*



1 (i) A device that can be used to deliver nicotine or cannabinoids in the form  
2 of a vapor or aerosol to a person inhaling from the device; or

3 (ii) A component of a device described in this subparagraph or **a substance**  
4 **in any form sold for the purpose of being vaporized or aerosolized by a**  
5 **device described in this subparagraph**, whether the component or  
6 substance is sold separately or is not sold separately.

7 (B) “Inhalant delivery system” does not include:

8 (i) Any product that has been approved by the United States Food and Drug  
9 Administration for sale as a tobacco cessation product or for any other  
10 therapeutic purpose, if the product is marketed and sold solely for the  
11 approved purpose; and

12 (ii) Tobacco products.

13 ORS 431A.175(1)(a)(A)–(B) (emphasis added).

14 31.

15 ORS 431A.190(5) provides that “tobacco products” has the meaning given in ORS  
16 431A.175, which defines “tobacco products” as follows:

17 (b) “Tobacco products” means:

18 (A) Bidis, cigars, cheroots, stogies, periques, granulated, plug cut, crimp cut, ready  
19 rubbed and other smoking tobacco, snuff, snuff flour, cavendish, plug and twist  
20 tobacco, fine-cut and other chewing tobaccos, shorts, refuse scraps, clippings,  
21 cuttings and sweepings of tobacco and other forms of tobacco, prepared in a manner  
22 that makes the tobacco suitable for chewing or smoking in a pipe or otherwise, or  
23 for both chewing and smoking;

(B) Cigarettes as defined in ORS 323.010 (1); or

(C) A device that:

(i) Can be used to deliver tobacco products to a person using the device; and

(ii) Has not been approved by the United States Food and Drug  
Administration for sale as a tobacco cessation product or for any other  
therapeutic purpose, if the product is marketed and sold solely for the  
approved purpose.

24 ORS 431A.175(1)(b).

25 32.

26 ORS 323.010 defines “cigarette” as follows:

27 (1) “Cigarette” means any product that contains nicotine, is intended to be burned  
28 or heated under ordinary conditions of use and consists of or contains:

1 (a) Any roll of tobacco wrapped in paper or in any substance not containing  
tobacco;  
2 (b) Tobacco, in any form, that is functional in the product and that, because  
of its appearance, the type of tobacco used in the filler or its packaging and  
3 labeling, is likely to be offered to, or purchased by, consumers as a cigarette;  
4 (c) Any roll of tobacco that is wrapped in any substance containing tobacco  
and that, because of its appearance, the type of tobacco used in the filler or  
its packaging and labeling, is likely to be offered to, or purchased by,  
5 consumers as a cigarette described in paragraph (a) of this subsection; or  
6 (d) A roll for smoking that is of any size or shape and that is made wholly  
or in part of tobacco, irrespective of whether the tobacco is pure or flavored,  
7 adulterated or mixed with any other ingredient, if the roll has a wrapper  
made wholly or in greater part of tobacco and if 1,000 of these rolls  
collectively weigh not more than three pounds.

8  
9 ORS 323.010(1).

10 33.

11 ORS 431A.198(1) provides that “the Department of Revenue **shall issue** licenses to, and  
12 annually renew licenses for, a person that makes retail sales of **tobacco products** or **inhalant**  
13 **delivery systems** at qualified premises.” *See* ORS 431A.198(1) (emphasis added).

14 34.

15 ORS 431A.194 proves that “[a] person may not make a retail sale of a **tobacco product** or  
16 an **inhalant delivery system** at or from a premises located in this state unless the person sells the  
17 tobacco product or inhalant delivery system at or from a premises licensed or otherwise authorized  
18 under ORS 431A.198 or 431A.220.” ORS 431A.194 (emphasis added).

19 35.

20 The Oregon Legislature passed Senate Bill 587 (now *See* ORS 431A.190–220) (hereinafter  
21 “SB 587”) which was signed into law by Governor Brown on or about July 19, 2021. The operative  
22 date of SB 587 was January 1, 2022. *See* ORS 431A.190–220.

23 ///

1 36.

2 SB 587 creates a statewide tobacco retail license and specifically authorizes the licensed  
3 sale of tobacco products and inhalant delivery systems statewide, as defined under state law.

4 37.

5 MCO 1311 will prohibit Plaintiff Division Vapor from selling nearly all products it  
6 currently offers for sale.

7 38.

8 MCO 1311 will prohibit many of Plaintiff Association's members and supporters in  
9 Multnomah County from selling most products they currently offer for sale.

10 39.

11 Plaintiff Division Vapor's customers, as well as the customers of Plaintiff Association's  
12 members and supporters, are harmed by MCO 1311 because the Ordinance will prohibit the sale  
13 of nearly all products currently offered by Plaintiff Division Vapor, and they will have no other  
14 location to purchase these products in Multnomah County.

15 40.

16 MCO 1311 violates or is inconsistent with SB 587.

17 41.

18 MCO 1311 is preempted by SB 587.

19 42.

20 If not enjoined by this Court, Defendant and its agents, representatives, and employees will  
21 administer, implement, and enforce MCO 1311. This will violate or be inconsistent with SB 587  
22 and the Oregon Constitution, and subject Plaintiffs to recourse by Multnomah County.

23 ///

1 43.

2 This course of conduct will cause Plaintiffs to suffer irreparable injury. This irreparable  
3 injury includes the permanent closure of Plaintiff Division Vapor's business, as well as the  
4 respective businesses of Plaintiff Association's members and supporters, and the loss of all  
5 investment in those businesses. This irreparable injury also includes permanently depriving  
6 Plaintiff Division Vapor and many of Plaintiff Association's members and supporters in  
7 Multnomah County of the full scope of their tobacco retail license. Plaintiffs have no plain, speedy,  
8 and adequate remedy at law for such injury. Accordingly, injunctive relief is appropriate.

9 **FIRST CLAIM FOR RELIEF**

10 **Declaratory Judgment; ORS 28.020**

11 **COUNT ONE**

12 **(SB 587 Expressly Preempts MCO 1311)**

13 44.

14 Plaintiffs reallege and incorporate by reference the allegations of Paragraphs 1–43 as  
15 though fully set forth here.

16 45.

17 SB 587 does not prohibit the sale of Flavored Tobacco Products.

18 46.

19 SB 587 provides, at ORS 431A.218(2)(a) that:

20 (2) Each local public health authority may:

21 (a) Enforce, pursuant to an ordinance enacted by the governing body of the local public  
22 health authority, standards for regulating the retail sale of tobacco products and inhalant  
23 delivery systems for purposes related to public health and safety in addition to the standards  
described in paragraph (b) of this subsection, including qualifications for engaging in the  
retail sale of tobacco products or inhalant delivery systems that are in addition to the  
qualifications described in section 5 of this 2021 Act;

*See* ORS 431A.218(2)(a).

47.

SB 587 does not grant counties the authority to prohibit the retail sale of any product regulated by SB 587.

48.

SB 587 provides a continuity provision at ORS 431A.220 which provides that:

A city or local public health authority that, on or before January 1, 2021, and pursuant to an ordinance adopted by the governing body of the city or local public health authority, enforced standards described in section 17 (2)(a) of this 2021 Act and required that a person that makes retail sales of tobacco products or inhalant delivery systems in an area subject to the jurisdiction of the city or local public health authority hold a license or other authorization issued by the city or local public health authority may continue to enforce the standards and require the license or other authorization on and after the operative date specified in section 24 of this 2021 Act.

*See* ORS 431A.220.

49.

MCO 1311 was not passed or effective on or before January 1, 2021.

50.

MCO 1311 is expressly preempted by SB 587.

**COUNT TWO**

**(SB 587 Impliedly Preempts MCO 1311)**

51.

Plaintiff realleges and incorporates by reference the allegations of Paragraphs 1–50, and especially Paragraphs 44–50, as though fully set forth here.

52.

Strictly as an alternative to Count One of Plaintiffs' First Claim for Relief, Plaintiffs assert

1 that MCO 1311 is impliedly preempted by SB 587.

2 **COUNT THREE**

3 **(MCO 1311 is Violates Or. Const. Art. VI, Sec. 10)**

4 53.

5 Plaintiff realleges and incorporates by reference the allegations of Paragraphs 1–52 as  
6 though fully set forth here.

7 54.

8 Article VI, Sec. 10 of the Oregon Constitution states, in its relevant part, as follows: “A  
9 county charter may provide for the exercise by the county of authority over matters of county  
10 concern.” *See* Or. Const. Art. VI, Sec. 10.

11 55.

12 The Oregon legislature has specifically authorized the statewide sale of tobacco products,  
13 flavored or unflavored.

14 56.

15 MCO 1311 interferes with the scope of the conduct authorized by SB 587, prohibiting that  
16 which the State of Oregon has authorized.

17 57.

18 It is a matter of state concern, and not county concern, whether to prohibit or permit the  
19 sale of tobacco products, flavored or unflavored.

20 **SECOND CLAIM FOR RELIEF**

21 **Declaratory Judgment; ORS 28.020; Multnomah County**

22 **COUNT ONE**

23 **(SB 587 Expressly Preempts Multnomah County Tobacco Retail Licensure Program)**

1 58.

2 Plaintiff realleges and incorporates by reference the allegations of Paragraphs 1–57 as  
3 though fully set forth here.

4 59.

5 ORS 431A.220 allows for the continuity of local tobacco retail licensure programs. For a  
6 local licensure program to continue, it must have met the requirements of ORS 431A.220, pursuant  
7 to an ordinance, on or before January 1, 2021.

8 60.

9 For Defendant’s local tobacco retail licensure program to continue pursuant to ORS  
10 431A.220, the program must have, on or before January 1, 2021 and pursuant to an ordinance,  
11 “enforced standards described in [ORS 431A.218(2)(a)] and required that a person that makes  
12 retail sales of tobacco products or inhalant delivery systems in an area subject to the jurisdiction  
13 of the city or local public health authority hold a license or other authorization issued by the city  
14 or local public health authority[.]” ORS 431A.220 (bracketed language supplied).

15 61.

16 Among the standards described in ORS 431A.218(2)(a) are the qualifications for engaging  
17 in the retail sale of tobacco products or inhalant delivery systems described in ORS 431A.198.

18 62.

19 ORS 431A.198 requires that:

20 (2) To be qualified for licensure under this section, a premises:

21 (a) Must be a premises that is fixed and permanent;

22 (b) May not be located in an area that is zoned exclusively for residential  
use; and

23 (c) Must meet any qualification for engaging in the retail sale of tobacco  
products and inhalant delivery systems enacted as an ordinance by the  
governing body of a local public health authority under ORS 431A.218,  
provided that the department has knowledge of the qualification pursuant to

1 an agreement entered into under ORS 431A.212.

2 63.

3 Defendant did not require that a premises licensed pursuant to its tobacco retail licensure  
4 ordinance be a premises that is fixed and permanent pursuant to an ordinance in effect prior to  
5 January 1, 2021.

6 64.

7 Defendant did not require that a premises licensed pursuant to its tobacco retail licensure  
8 ordinance be a premises that is not located in an area that is zoned exclusively for residential use  
9 pursuant to an ordinance in effect prior to January 1, 2021.

10 65.

11 The Multnomah County Tobacco Retail License Program is expressly preempted by SB  
12 587, including MCC §§ 21.561, 21.564, 21.566, 21.567, 21.568, and any other section of the  
13 Multnomah County Code that requires, enforces, or are otherwise part of the local tobacco retail  
14 licensure scheme.

15 **COUNT TWO**

16 **(SB 587 Impliedly Preempts Multnomah County Tobacco Retail Licensure Program)**

17 66.

18 Plaintiffs reallege and incorporate by reference the allegations of Paragraphs 1–65, and  
19 especially Paragraphs 58–65, as though fully set forth here.

20 67.

21 Strictly as an alternative to Count One of Plaintiffs’ Second Claim for Relief, Plaintiffs  
22 assert that The Multnomah County Tobacco Retail License Program is impliedly preempted by  
23 SB 587, including MCC §§ 21.561, 21.564, 21.566, 21.567, 21.568, and any other section of the



1 Multnomah County Code that requires, enforces, or are otherwise part of the local tobacco retail  
2 licensure scheme.

3 **ATTORNEY FEES**

4 68.

5 If Plaintiffs are determined to be the prevailing parties, they are entitled to recover their  
6 court costs and reasonable attorney fees pursuant to this Court's inherent equitable power to award  
7 attorney fees under the substantial benefit theory in an amount to be determined by the Court  
8 because they will have vindicated the rights of others. *De Young v. Brown*, 368 Or 64 (2021);  
9 *Armatta v. Kitzhaber*, 327 Or 250 (1998); *Deras v. Myers*, 272 Or 47 (1975).

10 **PRAYER FOR RELIEF**

11 WHEREFORE, Plaintiff request judgment against Defendants as follows:

- 12 1. For entry of Judgment against Defendant;
- 13 2. On Plaintiffs' First Claim for Relief, Count 1, for a Declaration under the Oregon  
14 Uniform Declaratory Judgment Act that MCO 1311 has been preempted by State  
15 Law through SB 587 and for entry of a permanent injunction against Defendant  
16 prohibiting Defendant from enforcing MCO 1311;
- 17 3. On Plaintiffs' First Claim for Relief, Count 2, as an alternative to the relief sought  
18 through Count 1, a Declaration under the Oregon Uniform Declaratory Judgment  
19 Act that MCO 1311 has been preempted by State Law through SB 587 and for entry  
20 of a permanent injunction against Defendant prohibiting Defendant from enforcing  
21 MCO 1311;
- 22 4. On Plaintiffs' First Claim for Relief, Count 3, a Declaration under the Oregon  
23 Uniform Declaratory Judgment Act that MCO 1311 is unconstitutional because it

violates Article VI, Section 10 of the Oregon Constitution and for entry of a permanent injunction against Defendant prohibiting Defendant from enforcing MCO 1311;

5. On Plaintiffs' Second Claim for Relief, Count 1, for a Declaration under the Oregon Uniform Declaratory Judgment Act that Defendant's local tobacco retail license program including, but not limited to, MCC §§ 21.561, 21.564, 21.566, 21.567, 21.568, and any other section of the Multnomah County Code that requires, enforces, or are otherwise part of the local tobacco retail licensure scheme has been preempted by State Law through SB 587 and for entry of a permanent injunction against Defendant prohibiting Defendant from enforcing its local tobacco retail license program;

6. On Plaintiffs' Second Claim for Relief, Count 2, as an alternative to the relief sought through Count 1, for a Declaration under the Oregon Uniform Declaratory Judgment Act that Defendant's local tobacco retail license program including, but not limited to, MCC §§ 21.561, 21.564, 21.566, 21.567, 21.568, and any other section of the Multnomah County Code that requires, enforces, or are otherwise part of the local tobacco retail licensure scheme has been preempted by State Law through SB 587 and for entry of a permanent injunction against Defendant prohibiting Defendant from enforcing its local tobacco retail license program;

7. Plaintiffs' costs and reasonable attorney fees pursuant to this Court's inherent equitable power to award attorney fees under the substantial benefit theory in an amount to be determined by the Court because they will have vindicated the rights of others. *De Young v. Brown*, 368 Or 64 (2021); *Armatta v. Kitzhaber*, 327 Or 250

1 (1998); *Deras v. Myers*, 272 Or 47 (1975).

2 8. Any other relief allowed by law or equity that this Court finds just.

3  
4 DATED: **January 26, 2023**

5 **Tyler Smith and Associates, PC**

6 By /s/ Tony L. Aiello, Jr.  
7 Tony L. Aiello, Jr., OSB #203404  
8 *Of Attorneys for Plaintiffs*  
9 181 N. Grant Street, Suite 212  
10 Canby, Oregon 97013  
11 (P) 503-496-7177; (F) 503-212-6392  
12 Tony@RuralBusinessAttorneys.com  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23

BEFORE THE BOARD OF COUNTY COMMISSIONERS  
FOR MULTNOMAH COUNTY, OREGON

ORDINANCE NO. 1311

Amending Multnomah County Code Sections 21.513 to 21.515, 21.550, 21.560 and Section 21.563.

(Language stricken is deleted; underlined language is new.)

**The Multnomah County Board of Commissioners Finds:**

1. Use of tobacco products remains the leading cause of preventable death and disease, killing nearly 8,000 Oregonians each year from cancer and cardiovascular and respiratory diseases. 27.5% of cancer deaths in Oregon are attributable to smoking.
2. More than 1,200 Multnomah County residents die due to tobacco every year (that's more than 3 people each day), at an estimated county cost of \$578 million per year due to direct medical costs and lost productivity.
3. Flavored tobacco products are popular among youth and young adults and are a key cause of the chronic use of tobacco products for all ages. Eight out of ten youth who have ever used a tobacco product initiated with a flavored product. In particular, use of flavored e-cigarettes and vaping products have rapidly increased during recent years, despite a 25-year trend of reduced combustible cigarette sales.
4. Flavored tobacco products contain nicotine, which is a dangerous and highly addictive chemical that adversely affects the cardiovascular system. According to the US Surgeon General, nicotine is also especially dangerous for youth, as it has been shown to disrupt brain development and negatively affect attention, learning, and susceptibility to addiction.
5. Menthol tobacco products are also popular among youth and young adults and are a key cause of the chronic use of tobacco products for all ages.
6. Tobacco companies have created racial and ethnic health disparities due to targeted marketing of menthol tobacco products to our Black, African-American, and LGBTQ+ community members, which has caused greater addiction in those communities.
7. Minimum sales age inspections, performed by the Multnomah County Tobacco Retail Program, have found that many tobacco retailers continue to illegally sell tobacco products to individuals under the age of 21-years old. Significantly, retailers

selling tobacco products at locations legally required to limit access inside the premises to individuals at least 21-years old have actually had the highest rates of illegal sales to individuals under 21-years old.

8. Under ORS 431, Multnomah County is the local public health authority. A core responsibility of the local public health authority is to adopt ordinances necessary to administer any public health matter not expressly preempted by state or federal laws.

### **Multnomah County Ordains as Follows:**

#### **Section 1. MCC § 21.513 is amended as follows:**

##### **~~§ 21.513 – INHALANT DELIVERY SYSTEM SALES TO MINORS PROHIBITED.~~**

~~No person, including Inhalant Delivery System Retailers, may distribute, sell, or allow to be sold an inhalant delivery system to a person under 18 years of age.~~

#### **Section 2. MCC § 21.514 is amended as follows:**

##### **~~§ 21.514 – POSSESSION BY MINORS.~~**

~~A person under 18 years of age may not possess an inhalant delivery system unless the person is in a private residence accompanied by the parent or guardian of the person and the parent or guardian has consented to the person's possession of the inhalant delivery system.~~

#### **Section 3. MCC § 21.515 is amended as follows:**

##### **~~§ 21.515 – PURCHASE BY MINORS.~~**

~~A person under 18 years of age may not purchase, attempt to purchase, or acquire inhalant delivery systems unless acting under the supervision of an adult for the purpose of testing compliance with federal law, state law, local law, or retailer management policy limiting or regulating the delivery of inhalant delivery systems to minors.~~

#### **Section 4. MCC § 21.550 is amended as follows:**

##### **§ 21.550 - PENALTY.**

(A) Violation of Sections 21.512 ~~or 21.513~~ shall be a Class A violation.

(B) Violation of Sections 21.511 ~~or 21.515~~ shall be a Class B violation. ~~Alternative penalties for violation of Section 21.515 may be promulgated by administrative rule, and as allowed by law, including but not limited to smoking cessation education and community service.~~

(C) ~~Violation of Section 21.514 shall be a Class D violation. Alternative penalties may be promulgated by administrative rule, as allowed by law, including but not limited to smoking cessation education and community service.~~

**Section 5. MCC § 21.560 is amended as follows:**

**§ 21.560 – DEFINITIONS.**

***Arm’s Length Transaction.*** A sale in good faith and for valuable consideration that reflects the fair market value in the open market between two or more informed and willing parties, none of which is under any compulsion to participate in the transaction. A sale between relatives, related companies or partners, or a sale for which a significant purpose is avoiding the effect of the violations of this chapter is not an Arm’s Length Transaction.

\* \* \*

***Flavored Tobacco Product.*** Tobacco product with a distinguishable or distinctive natural or artificial taste, flavor, smell or aroma, other than tobacco, that emanates from or is imparted by a tobacco product, a component of a tobacco product, or a tobacco product’s smoke or vapor at any time prior to or during consumption. Flavored tobacco products include (but are not limited to) those tobacco products with a mint, menthol, wintergreen, fruit, candy, honey, cocoa, chocolate, herb, spice, vanilla, liquor, and any and all other distinguishable or distinctive natural or artificial tastes, flavors, smells, or aromas, other than tobacco.

\* \* \*

***Tobacco Products.***

(A) Any substance containing, made, or derived from tobacco or nicotine, natural or synthetic, that is intended for human consumption by any means including but not limited to cigarettes, cigars, little cigars, pipe tobacco, shisha, hookah tobacco, snuff, chewing tobacco, dipping tobacco, bidis, or any other preparation of tobacco or nicotine.

\* \* \*

**Section 6. MCC § 21.563 is amended as follows.**

**§ 21.563 – PROHIBITED ACTIVITIES.**

(A) It is a violation of this subchapter for a Tobacco Retailer to make available Tobacco Products:

- (1) Without a Tobacco Retail License.
- (2) From a motor vehicle.
- (3) Outside original packaging containing health warnings satisfying the requirements of federal law.
- (4) To a person who appears to be under the age of 27 years without first examining the recipient’s identification to confirm that the recipient is at

least the minimum age under federal, state, or local law to purchase and possess Tobacco Products.

(B) It is a violation of this subchapter for a Tobacco Retailer to make available any Flavored Tobacco Product to any person.

(C) It is a violation of this subchapter to fail to comply with license terms, the rules adopted pursuant to this subchapter, and federal, state, and local laws relating to the retail sale of tobacco products.

**Section 7.** Sections 5 and 6 of this Ordinance shall take effect on January 1, 2024. Sections 1 through 4 of this Ordinance shall take effect on the 30<sup>th</sup> day after signature by the Chair of the Board of Commissioners. MCC § 21.560 through MCC § 21.568 shall continue to apply in all areas of Multnomah County, including incorporated and unincorporated areas.

FIRST READING: 12/1/2022

SECOND READING AND ADOPTION: 12/15/2022



BOARD OF COUNTY COMMISSIONERS  
FOR MULTNOMAH COUNTY, OREGON

*Deborah Kafoury*

Deborah Kafoury, Chair

REVIEWED:  
JENNY MADKOUR, COUNTY ATTORNEY  
FOR MULTNOMAH COUNTY, OREGON

By *Robert E. Sinnott*  
Robert E. Sinnott, Senior Assistant County Attorney